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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JAMALL BAKER,

9 Plaintiff,

10 v.

11 JERALD GRANT, et al.,

12 Defendants.

Case No. C17-1678-RSL-MAT

ORDER

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14 This is a 42 U.S.C. § 1983 prisoner civil rights action. On February 7, 2019, the Honorable
15 Robert S. Lasnik granted in part and denied in part defendants' motion for summary judgment
16 based on failure to exhaust. (Dkt. 72.) Relevant to the instant Order, Judge Lasnik denied
17 summary judgement as to plaintiff's First Amendment retaliation claim against Officer Neely
18 because there were disputed issues of material fact and re-referred the matter to the undersigned
19 for further proceedings, including an evidentiary hearing to resolve the disputed issues of fact and
20 decide whether plaintiff exhausted his administrative remedies. (*Id.*)

21 The undersigned subsequently granted plaintiff leave to move for the appointment of pro
22 bono counsel for the limited purpose of conducting an evidentiary hearing on the issue of
23 exhaustion. (Dkt. 77.) Plaintiff timely filed a motion to appoint counsel, which defendants

1 opposed. (Dkts. 79 & 81.)

2 Then on April 1, 2019, defendants filed a motion for summary judgment that addresses the
3 merits of plaintiff's First Amendment claim against Officer Neely, as well as his Eighth
4 Amendment claim against Officer Grant. (Dkt. 84.)

5 Given that defendants are now seeking summary judgment on the merits of plaintiff's First
6 Amendment claim against Officer Neely, it is unclear whether defendants intend to waive their
7 argument that plaintiff failed to exhaust that claim. *See Albino v. Baca*, 747 F.3d 1162, 1170 (9th
8 Cir. 2014) ("[A] defect in subject-matter jurisdiction, *unlike a failure to exhaust*, is a nonwaivable
9 defect." (emphasis added)). If defendants waive their exhaustion argument, there will no longer
10 be a need for the Court to hold an evidentiary hearing. On the other hand, if defendants still wish
11 to pursue exhaustion as an affirmative defense, the Court will resolve that issue before addressing
12 their newly filed motion for summary judgment.

13 Based on the foregoing, the Court ORDERS defendants to notify the Court by **April 19,**
14 **2019**, whether or not they waive their argument that plaintiff failed to exhaust his administrative
15 remedies with respect to his First Amendment retaliation claim against Officer Neely. The Clerk
16 is directed to RE-NOTE plaintiff's pending motions (Dkts. 75, 79, 80) for April 19, 2019, and to
17 second copies of this Order to the parties and to Judge Lasnik.

18 Dated this 11th day of April, 2019.

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21 Mary Alice Theiler
22 United States Magistrate Judge
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